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No. 82-849

In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

SERGIO ELEJAR MENDOZA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that the United States was collaterally estopped from relitigating a question of constitutional law by the judgment of a district court in a prior case, involving the same subject matter, in which the question was resolved adversely to the United States and in which the United States voluntarily withdrew its appeal.

TABLE OF CONTENTS

	Pages
Question Presented	i
Summary of Argument	1
Argument:	
On the facts of this case, the Government should not be excepted from the doctrine of collateral estoppel.	3
A. The principles of *Parklane Hosiery Co. v. Shore* and *Montana v. United States* are squarely applicable to this case and call for the application of collateral estoppel.	4
B. The role of the Government as a litigant enforcing the public laws does not prevent the application of collateral estoppel against the Government in this case.	17
Conclusion	27

TABLE OF AUTHORITIES

CASES:

American Medical International, Inc. v. Secretary of HEW, 677 F. 2d 118 (D. C. Cir. 1981)	23
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971)	24
E. I. DuPont de Nemours & Co. v. Train, 430 U. S. 112 (1977)	23
INS v. Hibi, 414 U. S. 5 (1973)	5, 13

TABLE OF AUTHORITIES—Continued

Pages

Montana v. United States, 440 U. S. 147 (1979)....1, 2, 3, 4, 7, 10, 11, 12, 14, 16, 19, 20

In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N. D. Cal. 1975)....2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 23

Olegario v. United States, 473 F. Supp. 185, rev'd, 629 F. 2d 204 (2d Cir. 1980), *cert. denied*, 450 U. S. 980 (1981) 7, 8, 9, 22

Parklane Hosiery Co. v. Shore, 439 U. S. 322 (1979) 1, 4, 5, 6, 9, 10, 24

Standefer v. United States, 447 U. S. 10 (1980) 24

U. S. A. v. Marshall, 603 F. 2d 590 (7th Cir. 1979)..... 22

United States v. Moser, 266 U. S. 236 (1924)....10, 13, 14, 16

United States v. Stauffer Chemical Co., 684 F. 2d 1174 (6th Cir. 1982), cert. granted, No. 82-1448 (Apr. 18, 1983) 3, 19, 22, 26

Western Oil & Gas Ass'n v. EPA, 633 F. 2d 803 (9th Cir. 1980) 23

Winters v. Lavine, 574 F. 2d 46 (2d Cir. 1978) 14

OTHER AUTHORITIES:

28 C. F. R. § 0.20 26

Section 702 of the Nationality Act of 1940..... 18

8 U. S. C. 1421 (e) 13

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BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

On the facts of this case, the Government should not be excepted from the rule of collateral estoppel as applied in *Parklane Hosiery Co. v. Shore*, 439 U. S. 322 (1979) and *Montana v. United States*, 440 U. S. 147 (1979).

1. *Parklane* stands for the rule that unless the application of collateral estoppel would be unfair, a party that litigated an issue in a prior lawsuit should not be allowed to relitigate the same issue in a subsequent action against another opponent. Although *Parklane* involved the relitigation of an issue of fact between private parties, the same rule of fairness should be applied as well to the Federal Government, even on an issue of

law. There would be nothing unfair about estopping the Government in the circumstances of this case. It had a full and fair opportunity to litigate, and did litigate, the very same issues in the earlier case of *In re Naturalization of 68 Filipino War Veterans,* 406 F. Supp. 931 (N. D. Cal. 1975). Yet the Government inexplicably chose instead to drop its appeal from that judgment even though it knew that still more veterans would be filing identical claims and raising identical issues.

2. The Government should be estopped on the basis of *Montana* as well, for *Montana* did involve the application of estoppel against the Federal Government on an issue of law far more significant than the issue raised here. Nor is *Montana* distinguishable on the theory that it was more like res judicata than collateral estoppel. The result in *Montana* did not depend upon a distinction between the two doctrines. Applying a *collateral estoppel analysis,* this Court estopped the Government because the issues were substantially the same as those raised in an earlier case; because there had been no intervening changes in the controlling facts or legal principles of the two cases; and because there were no special circumstances which called for an exception to the usual rule of preclusion, such as the presence of an unmixed question of law founded upon a "different demand" from that of the first action. Application of the same three standards in this case compels a like result.

3. The Government cannot escape the application of estoppel in this case on the ground that it has a unique role as a litigant in enforcing the public law. Whether or not this role might have significance in some cases, it certainly has none in this case. This case and

the cases of the other war veterans do not affect any broad public interest. They are unique in their facts, and a similar factual situation, realistically, will not arise again. Moreover, the cases do not deal with issues that have a vital effect on our daily lives, such as the manner of enforcing the Clean Air Act at issue on the merits in *United States v. Stauffer Chemical Co.*, 684 F. 2d 1174 (6th Cir. 1982), *cert. granted*, No. 82-1448 (Apr. 18, 1983). Rather, these cases affect only a limited well-defined, ever decreasing group of aging veterans of World War II.

Given these circumstances, the government cannot argue that estoppel here hampers the development of the law. The veterans' cases do not have that magnitude of significance. In addition, contrary to the Government's claims, the decision of the court below does not hamper and has never hampered the government from seeking diversity of legal opinion through litigation outside the Ninth Circuit.

In sum, the rule of *Montana v. United States*, a case dealing with important issues, surely extends to this case which hardly engages the public interest or affects the state of the law.

ARGUMENT

On the Facts of This Case, the Government Should Not Be Excepted from the Doctrine of Collateral Estoppel.

A. The Principles of Parklane Hosiery Co. v. Shore and Montana v. United States Are Squarely Applicable to this Case and Call for the Application of Collateral Estoppel.

Collateral estoppel is founded on the proposition that:

> "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. * * *
>
> Application of both doctrines [i.e., collateral estoppel and the related doctrine of res judicata] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U. S. 147, 153 (1979), citations omitted.

The application of collateral estoppel is subject to certain qualifications. For example, if the litigant can establish that prohibiting relitigation would be unfair, collateral estoppel does not apply. Likewise, if the facts or issues of the two cases are substantially different or present different claims, collateral estoppel would not apply because the same issue would not have been resolved in the prior lawsuit. Finally, there may have been an intervening change in controlling facts or legal principles or other special circumstances which call for an exception in a given case to the usual rule of issue preclusion.

Those are the lessons of *Parklane* and *Montana*. Squarely and unmistakably, they govern the outcome of this case, and preclude the Government from relitigating here the very same issues that were resolved against it in *88 Veterans*.

1. Application of Collateral Estoppel to the Facts of This Case Is Not Unfair to the Government.

The Government abandoned its appeal in *68 Veterans* with its eyes wide open.

The Government knew, given its statements in its brief to the Court of Appeals in that case, that other veterans beside the 68 themselves would take a victory in *68 Veterans* to mean that they too would be naturalized as American citizens.[1] Because *68 Veterans* involved so many veterans and was the first case to reach a court of appeals on the due process issue, the Government's decision to drop its appeal could only be taken by the veterans, and indeed by the Government itself, as a complete victory for all Filipino war veterans.

In *Parklane Hosiery,* this Court suggested that it might be unfair to preclude relitigation if the stakes in the first case were small, or the possibility of further litigation with other parties was not forseeable. Under either circumstance, said the Court, a litigant might have had little incentive to fully and vigorously pursue the initial litigation, or to appeal from an adverse judgment. 439 U. S. at 330.

But the stakes in *68 Veterans* were identical and the foreseeability of much future litigation was readily acknowledged by the Government itself. Thus, the Government contradicts itself when it suggests that the decision

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[1]See Brief for Appellant in *United States v. 68 Filipino War Veterans*, 9th Cir. No. 78-1832, at 19. The Government's knowledge that other veterans would apply is revealed as well in its petition for a writ of certiorari in *INS v. Hibi*, No. 72-1652 at 16-18.

below upset its "reasonable expectations" that it would be free to contest the naturalization of other veterans presenting the very same claim. Brief for the United States at 24.

An argument like that ought to fall on deaf ears. The only "reasonable expectations" that everyone had, including the Government, when its appeal was abandoned in *68 Veterans* was that all qualified Filipino war veterans would seek, and expect, to become American citizens without incurring the Government's further opposition.[2] Noting that the Government thus had every incentive to vigorously litigate *68 Veterans* and to prosecute an appeal from the adverse judgment, the Court of Appeals made this very point when it declared:

> "This is not a case where an original suit is followed by an unforeseen action involving much higher stakes. See *Parklane Hosiery*, 439 U.S. at 330, 99 S.Ct. at 651. On the contrary, in *68 Filipinos* the government faced 68 separate naturalization petitions joined together in one action, not a lone veteran seeking citizenship. It should have come as no surprise to the government that the effects of Judge Renfrew's decision would reach not only the 68 Filipinos before the court, but all similarly situated Filipino veterans, whatever their number." 672 F. 2d at 1327, Petition for Writ of Certiorari at 15a.

In *Parklane*, this court suggested that allowing collateral estoppel "may" be unfair to a litigant if the judgment relied upon for the estoppel is itself inconsistent with

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[2] That *68 Veterans* was not a class action changes nothing. Indeed, collateral estoppel would become a meaningless rule if it applied only in class action cases.

still another judgment in the litigant's favor.[3] As an inconsistent judgment which supposedly would make the application of collateral estoppel unfair here, the Government points to *Olegario v. United States*, 473 F. Supp. 185, rev'd, 629 F. 2d 204 (2d Cir. 1980), *cert. denied*, 450 U. S. 980 (1981).

Since the presence of an inconsistent judgment ***may***, rather than *would*, make the application of collateral estoppel unfair in a given case, the inquiry must center not on the fact of *Olegario* but on all pertinent circumstances to determine whether its existence does or does not make it unfair to estop the Government here.

There are several reasons why the presence of *Olegario* does not make it unfair to estop the Government here.

First *68 Veterans*, like this case, arose in the Ninth Circuit while *Olegario* was decided in another circuit. As noted in *Montana*, collateral estoppel is central to the purpose for which civil courts have been established, the "conclusive resolution of disputes *within their jurisdictions*." 440 U. S. at 153 (emphasis supplied). The court below was serving this purpose in applying collateral estoppel in this case. It was also promoting the uniformity of law within its jurisdiction.

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[3]The Government once again distorts the Court's opinion on this point. The Court, contrary to the Government's assertion, did not say that presence of an inconsistent judgment "would" make the application of collateral estoppel unfair. Rather, by using the word "may" the Court plainly meant that an inconsistent judgment could be one among other factors for determining whether estoppel would be unfair. This same error was made by the Government in its petition for a writ of certiorari, at 24.

Second, as the court below noted, any unfairness that may result from the application of collateral estoppel in this case is no greater than that resulting whenever circuits disagree. That is to say, it is not unusual for the Government or any person or entity litigating in more than one circuit to face a situation where different circuits have different rules concerning the same subject matter. The effect of collateral estoppel in this case is merely to fix *68 Veterans* as the rule of the Ninth Circuit, not of any other circuit. The fact that *Olegario* is contrary to *68 Veterans* does not create a situation that is unusual for the government or by definition prejudicial to it.

Third, the Government claims that the mere existence of *Olegario's* decision on the merits required the court below also to reach the merits for the sake of the law's development in the sense that a Ninth Circuit decision on the merits, if contrary to *Olegario,* would facilitate this Court's resolution of the merits.

In taking this position, the Government loses sight of the procedural posture of this case. This case does no damage to the Government's asserted interest in review by this Court for the simple reason that the case is in this Court now. If the court below is reversed, the Government will have its opportunity to contest the merits. If it loses on the merits on remand to the Ninth Circuit, it can bring the intercircuit conflict on the merits before this Court. On the other hand, if this Court affirms the court below, the Government cannot be heard to say that there would be or should ever have been a conflict between the circuits on the merits.

Fourth, this case is unlike the famous example of multiple lawsuits arising from a railroad accident as noted

in *Parklane*, 439 U.S. 330 n.14. In that situation, the defendant railroad, by winning the first 25 of 50 identical lawsuits had no way to protect itself against the possible application of collateral estoppel in future cases. Therefore, estopping it after a loss in the 26th case would be unfair. But in this instance, the Government *lost* the first case involving numerous veterans, and because it knew that future litigation was certain, had every incentive to pursue its appeal. Given those circumstances, the subsequent decision of a court in another circuit does not change the fact that estopping the Government now would not be unfair.

Fifth, the rationale of *Olegario* is unpersuasive. There, the court accepted, without critical analysis, the Government's assertion that relitigation was warranted because the case raised issues of national significance. As the discussion in part B of this brief below will more fully establish, however, the claims made by an aging group of World War II veterans can no longer be viewed realistically as involving issues of critical national importance.

Finally, estopping the Government in this case would promote uniformity in the application of our naturalization laws, the very same uniformity the Government says is so desirable. Brief for the United States at 18. Estoppel would actually promote uniformity because unless the Government is estopped there will be a substantial inequality in the enforcement of the naturalization laws among the very same group of applicants. More particularly, there will be those veterans who were included in *68 Veterans* and the Government's grandfather policy who are now enjoying the benefits of their American citizenship with the Government's blessing, and those, like Dr. Men-

doza, who would have to continue the fight for their long overdue citizenship and cannot understand why, unlike their former comrades, they continue to encounter the Government's stubborn and inexplicable opposition. Such inequality is to be discouraged.

Of course, *Parklane* involved an action between private parties over the relitigation of an issue of fact. Consequently, *Parklane* cannot be said to have precluded consideration in this case of an established exception to the rule of collateral estoppel relating to the relitigation of issues of law founded upon a demand which is different from that made in the first action.[4] *United States v. Moser*, 266 U. S. 236 (1924).

Nevertheless, there is nothing in *Parklane* which suggests that the fairness standard of *Parklane* should not be applied to issues of law as well, even when the Federal Government is the party to be estopped. Indeed, there are no policy reasons why the fairness test should not be applied to such cases. If the underlying rationale of collateral estoppel is the finality of judgments, then the fairness rule has equal applicability in all instances. After all, as this court recognized in *Montana*, a case plainly involving an issue of law and the Federal Government, collateral estoppel applies only to a party who has had a "full and *fair* opportunity" to litigate the very same issue before. 440 U. S. at 153, emphasis added. Consequently, the standard of fairness is inherently involved in the application of collateral estoppel in all instances. Obviously, in assessing the matter of fairness itself in a given

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[4]A discussion of the effect of that exception in the circumstances of this case appears in part A-2 of this brief below.

case, the fact that the case concerns an important matter of law, or that the Federal Government is a party, may be important factors for consideration. But as will be discussed more fully later in this brief, no such concerns are at stake in the most unusual circumstances of this case.

2. The Standards Applied in Montana to Determine the Applicability of Collateral Estoppel Compel a Like Result in This Case.

At issue in *Montana* was the constitutionality, under the Supremacy Clause, of a state tax indirectly imposed upon the Federal Government. The first action was brought by a private contractor, Kiewit, at the instigation of the Federal Government. Kiewit's role in the litigation was financed, directed and controlled by the Federal Government. At the Federal Government's direction, Kiewit withdrew an appeal in this Court from an adverse decision of the Montana Supreme Court. The Government then proceeded instead with a suit it had previously filed in its own name in the United States District Court.

Because of the relationship between the United States and Kiewit, the Government now attempts to escape the impact of *Montana* by suggesting that *Montana* was "in practical effect" a case of res judicata, rather than collateral estoppel, and is therefore inapplicable. Brief for the United States at 22. It was no such thing, in "practical effect" or otherwise. Res judicata and collateral estoppel are related but distinct concepts, and this Court's analysis plainly recognized the distinction. 440 U. S. at 153. Obviously, the Government's relationship with Kiewit was critical, for otherwise the Government might not have had a "full and fair opportunity" to litigate the issues in the first case and collateral estoppel would have been

inappropriate. The Court's discussion of that relationship is therefore consistent with the application of collateral estoppel.

Moreover, if the Court had classified the case as res judicata, it could have stopped after finding that Kiewit was the Government's proxy in the first case, for the identity of parties or their privies, given an identity of issues, would have been sufficient to trigger the application of res judicata. Instead, because the Government was not in fact Kiewit or its privy, the Court went on to decide the case under a three part collateral estoppel analysis. *Montana,* in other words, is a case which, by definition, plainly involved the application of collateral estoppel.

As described in *Montana,* the three inquiries which must be made to determine the appropriate application of collateral estoppel are: first, whether the issues presented in the second case were "in substance the same" as those resolved against the United States in the earlier case; second, whether "controlling facts or legal principles" have changed significantly between the two actions; and third, whether "other special circumstances warrant an exception to the normal rules of preclusion." 440 U. S. at 153. Measured against the same three standards, collateral estoppel should be applied in this case to prevent the Government from re-litigating the issues presented in *68 Veterans.*

The Government does not suggest that controlling facts or legal principles have changed since *68 Veterans.* Instead, it concentrates its attack under the first and third *Montana* inquiries by suggesting that "significant legal contentions" raised in this case were not addressed

in *68 Veterans,* Brief for the United States at 39 and 15, and by arguing that this case involves a "special circumstance" fitting within the *Moser* exception to collateral estoppel that is applicable to "pure questions of law arising in successive actions on substantially unrelated claims." Brief for the United States at 21.

As "significant legal contentions not addressed" in *68 Veterans* but which are raised here, the Government refers to the question of laches; the effect of 8 U. S. C. 1421 (e) which permits naturalization only in accordance with current statutory provisions; the precedential effect of *INS v. Hibi,* 414 U. S. 5 (1973); and Dr. Mendoza's alleged lack of standing to complain that he had been injured by withdrawal of the naturalization examiner from the Phillipines in 1945 because he, Dr. Mendoza, had an opportunity to apply for naturalization in the United States in 1945. Brief for the United States, at 39 and 15.

With respect to the first three matters, the Government is plainly mistaken. Had it bothered to review the record in *68 Veterans* or its own brief before the Court of Appeals in that case, it would have discovered that it opposed the naturalization of the veterans for all three of the stated reasons. See, for example, Brief of Appellant in *United States v. 68 Filipino War Veterans,* 9th Cir. No. 78-1832 at 40 (laches), 9 (8 U. S. C. 1421 (e)) and 33 (the effect of *Hibi*). Judge Renfrew specifically rejected the Hibi analogy in his opinion. 406 F. Supp. at 1031. And while he did not mention laches or the effect of 1421 (e), he must of necessity have resolved those matters against the Government for the simple reason that if he had agreed with the Government on those questions,

he could not have rendered his judgment in favor of the veterans.[5]

Unlike the *68 Veterans,* Dr. Mendoza did spend part of his military career in the United States and obviously could have applied for naturalization here had he known about the special naturalization law then in effect. In that sense, the facts of this case are different from the facts in *68 Veterans.* However, the proper inquiry under *Montana* is not whether there is some difference in the facts of the two cases but whether the issues addressed and resolved in the first case were so different "in substance" as to make collateral estoppel inappropriate. A difference in substance makes collateral estoppel inappropriate because collateral estoppel applies only when the party to be estopped had a full and fair opportunity to litigate the same *issues* earlier, an opportunity the party would not have had if the issues were substantially different.

The issue in *68 Veterans* and issue in this case are the very same—whether the Attorney General had the constitutional power to withhold the services of a naturalization representative from the Phillippines during the last days of World War II and its aftermath. That identity of issues is not affected or altered by Dr. Mendoza's presence in the United States for a time. The important fact is not that he was in the United States but that *he was in the Philippines* during the time when the natu-

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[5]The fact that certain issues raised during a lawsuit are not specifically mentioned in a court's written opinion does not mean those issues were not considered or resolved. *Winters v. Lavine,* 574 F. 2d 46 (2d Cir. 1978).

alization examiner was forbidden by the Attorney General from naturalizing qualified Filipino veterans there. Hence, he could not have applied there even though he was still eligible to apply at the time. Thus, the due process issue he has raised, is the very same issue resolved against the Government in *68 Veterans,* where the Government plainly had its very full day in court.

Turning to the third *Montana* inquiry, the Government says it should be excepted from the rule of collateral estoppel on the basis of *Moser* because this case involves an issue of law arising in successive actions on "substantially unrelated" claims. Brief for the United States at 21. The exception enunciated in *Moser* is to the effect that:

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." 266 U. S. at 242. Emphasis added.[6]

By definition then, the *Moser* exception applies only when the second action involves a "different demand." The critical question therefore involves the meaning of the term "different demand." Interpreting the *Moser* exception, this Court made it plain in *Montana* that a "different demand" is not simply one presented by a different litigant, as the Government seems to argue. Instead, a de-

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[6]The same emphasis was added by this Court when it referred to the same quotation in *Montana*. 440 U. S. at 162.

mand is "different" if it is related in neither time nor subject matter to that presented in the first case. 440 U.S. at 163.

The conceptual difficulties in delineating the scope of *Moser* were no particular problem to the Court in *Montana*, for it found that the demands of the second case were so "closely aligned in time and subject matter" to those of the first lawsuit as to make the *Moser* exception inapplicable. In this case, the "demand" of Dr. Mendoza is just as "closely aligned in time and subject matter" to those of the *68 Veterans*, for both concerned events that occurred in the aftermath of World War II, and both involved the constitutionality of the Attorney General's conduct at that time.

These factors take on increased significance when one considers the policy reasons for limiting the *Moser* exception to claims which are not substantially related in time or subject matter. As noted in *Montana*, those reasons concern the risk that the unreflective invocation of collateral estoppel could have the effect of freezing constitutional doctrine "where changing patterns of conduct or social mores are critical." 440 U.S. at 163. Thus, it follows that when two successive cases are in fact closely aligned in time and subject matter, there are no such risks to outweigh the fundamental purpose of collateral estoppel itself. Stated another way, there are no changing patterns of conduct or social mores which render the application of estoppel inappropriate in such a case.

Because the demands of Dr. Mendoza are not "substantially unrelated" to those of the *68 Veterans*, his claim is not a "different demand". Rather, this case belongs

within the second part of *Moser* and becomes, if not a fact or right, certainly a "question" adjudged in *68 Veterans* which "cannot be disputed in a subsequent action. . . ." 266 U. S. at 242.

B. The Role of the Government as a Litigant Enforcing the Public Laws Does Not Prevent the Application of Collateral Estoppel Against the Government in This Case.

Arguing from the uniqueness of its role as a litigant, the government asks this Court to accept the sweeping proposition that not only should issue preclusion not be applied in this case but, indeed, should *never* be applied to the government in any case especially when it is acting to enforce the public law. Brief for the United States at 25-26. Such an unprecedented immunity from preclusion would be extremely damaging to law and society. Beyond this, however, the present case does not even raise issues that any longer have a serious bearing on the enforcemnt of the public laws. Thus, although aspects of the government's role as a litigant might in some instances argue against the application of preclusion, they have no such weight in this case.

1. The War Veterans Litigation No Longer Involves Issues of National Importance.

In support of its position, the government notes that it is frequently a party to cases that raise "issues of greatest public importance, including constitutional issues. . . ." Brief of the United States at 28. And, indeed, the government is a party to a great deal of litigation that affects the lives of great numbers of persons, often to a serious degree. Yet, while all this may be true, it does not follow

that preclusion should not be applied when a case to which the government is a party does not raise an issue of great public importance. In such an instance, there is no public interest that can arguably override the policy of finality of judgments that underlies the doctrines of preclusion. The present case is such an instance. The war veterans litigation does not raise on its merits issues of any great moment or urgency. Additionally, the government's concern about recurring issues is misplaced here. Brief for the United States at 25, 28, 30. The cases of the war veterans involve a combination and sequence of circumstances so peculiar that, realistically, they will not occur again.

First of all, the cases deal with a discrete group of persons, namely, applicants for citizenship who can show requisite military service and who were unable to apply for citizenship due to the government's intentional failure to station a special naturalization examiner in the Philippines during relevant times. Given the passage of years, this discrete group is fading. Moreover, no new persons can now or ever could enter the group. Second, in question is a law, namely, § 702 of the Nationality Act of 1940, that strictly limits eligibility for citizenship to definite places of military service and times of service. This law cannot be extended to cover any persons other than the discrete group mentioned above. Third, the type of factual and legal context involved in the litigation of the war veterans will not arise again.[7] Fourth, the war veterans

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[7]For it to do so, there would have to be another major emergency like World War II; in response to the emergency, Congress would have to enact naturalization laws similar to

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litigation raises no questions affecting the daily conduct of the government's business such as the proper methods of enforcement of a statute or regulation with a pervasive national effect. *See United States v. Stauffer Chemical Co.*, 684 F. 2d 1174 (6th Cir. 1982), *cert. granted*, No. 82-1448 (Apr. 18, 1983). Cases like *Stauffer Chemical* can have a tremendous national impact because they may concern, for example, the quality of our environment through the manner in which the environmental laws are enforced. The issues in the veterans cases, however, have a present day vitality not to the nation at large, but only to the ever decreasing group mentioned above.

Having, somewhat surprisingly, implied that the war veterans litigation raises critical issues of national importance, the government then seeks to further distinguish *Montana v. United States* from the present case on the grounds that *Montana* did not involve a body of law applicable to a great number of persons and affected only the proprietary interests of the United States.[5] Brief for the United States at 35. Contrary to the government's char-

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those involved in the present litigation; the Attorney General would have to refuse to enforce those laws by withdrawing a special naturalization examiner from a United States possession about to become independent; and, finally, there would have to be later litigation, followed by the Government's inexplicable abandonment of an appeal from an adverse judgment in the face of the certainty of much future litigation involving the same stakes.

[5]The government's other attempts to distinguish Montana (namely, that Montana concerned unmixed questions of law and somehow involved the principles of *res judicata* rather than collateral estoppel) have already been discussed in Part A of this brief.

acterization of the case, *Montana* has a significance far outreaching that of the war veterans cases. Not only did the government see fit to finance and control the *Montana* litigation in two courts, but the number of states represented in the *amicus* briefs in this Court shows how seriously the taxation issue in *Montana* was regarded throughout the United States. *See* Amicus briefs, *Montana v. United States,* No. 77-1134. In addition, somewhat more than the proprietary interests of the government was in issue in *Montana.* Indeed, *Montana* concerned federal-state relations under the Supremacy Clause as related to the states' ability to impose an indirect tax on the federal government. Thus, the government cannot avoid application of *Montana* in this case by seeking to minimize *Montana's* significance while inflating the significance of this case out of all proportion. Rather, if the government could be estopped in *Montana,* it should *a fortiori* be estopped here.

In concluding this section of respondent's brief, we note that, although the government asserts the public interest in this case, it has never specified what it feels the public interest actually is. The court below sought to discover this interest in its query regarding whether the government had every incentive to diligently litigate *68 Veterans* or whether it was faced in the present case with an unforeseen action involving higher "stakes". 672 F. 2d at 1326-28; Petition of the United States at 11a-16a. The court concluded its opinion by noting that there appeared to be no critical need to redetermine the veterans' rights now and no discernable compelling public interest in redetermination. 672 F. 2d at 1329-30; Petition of the United States at 19a-20a.

The government would now like to characterize the court below's discussion as based on an improper assumption that the United States has an obligation to justify its litigating conduct to the courts.[9] Additionally, it claims that the court's language regarding a "critical need" and a "compelling public interest" really amounts to the establishment of a standardless discretion. Yet, it is clear that the court below was not doing this at all. Rather, it was seeking what might be the public interest that the government continually asserts but never defines.[10] For, after all, in this case, "public interest" is one way of defining the "stakes." In the circumstances, the position of the court below is both reasonable and easy to state. It was faced with a situation where the Government failed to pursue an appeal from a significant judgment and was now asking the jurisdiction in which the judgment was rendered to give the judgment no effect on grounds of the public interest. The court quite naturally asked the party asserting the public interest simply to say what it is. The government, of course, has never done this.

2. The Application of Preclusion to the Government in This Case Will Not Result in the Disruption of the Development of the Law.

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[9]Although the government feels that it has no obligation to justify its "litigating conduct" to the courts, it seems to feel, somewhat contradictorily, that related type of conduct (namely, how the Solicitor General makes litigating decisions) should carry weight with this Court. Brief for the United States at 30-31.

[10]The Government does assert a vague interest in the enforcement of naturalization laws. Brief for the United States at 36. However, this case does not concern the enforcement of such laws. It concerns a deliberate decision *not* to enforce those laws.

The government's argument to the contrary is based on the proposition that, because the government sometimes finds itself advancing or defending the same or similar issues in a number of jurisdictions, it may eventually become subject to an adverse decision in one jurisdiction that will be used to preclude it in all others. The claimed result is that the decision of one court will be able to determine or freeze the law for all others.

This argument might have force in many situations, but certainly not in this case. This case is entirely distinguishable from cases like *Stauffer Chemical* or *Continental Can Co., U.S.A. v. Marshall*, 603 F. 2d 590 (7th Cir. 1979), wherein the Sixth and Seventh Circuits estopped the government from litigating questions of continuing vitality (respectively, whether private contractors of the Environmental Protection Agency are authorized by the Clean Air Act to conduct or participate in administrative searches or inspections; and whether economic or technical feasibility was the criterion for requiring engineering controls under a noise regulation of the Occupational Safety and Health Administration) because of the adverse judgments of courts in other jurisdictions.

Stauffer Chemical and *Continental Can* raise the possibility that the judgment of one court might be able to bind the government nationwide and thereby freeze legal development nationwide. However, the decision of the court below does no such thing. Rather, its application of estoppel was based on the judgment of a court within its jurisdiction. Moreover, that judgment has not hampered the government outside the Ninth Circuit. Indeed, the judgment in favor of the government in *Olegario* is witness to the fact that courts outside the Ninth Circuit

have not considered themselves bound by *68 Veterans*. In this respect, no disservice is being done to the value of allowing independent consideration of a legal issue by several courts. *See, e.g., E. I. DuPont de Nemours & Co. v. Train*, 430 U. S. 112, 135 and 135 n. 23 (1977). Indeed, the court below has previously served that same value. *See Western Oil & Gas Ass'n v. EPA*, 633 F. 2d 803 (9th Cir. 1980). Moreover, *68 Veterans* itself, although a district court case, serves this same value in that it is among varying decisions that would facilitate decision making on the merits by this Court, if necessary.[11] The foregoing considerations should be added to the factor that this case is not one that engages the public interest. *American Medical International, Inc. v. Secretary of HEW*, 677 F. 2d 118, 121 n. 24 (D. C. Cir. 1981). When this is done, it becomes clear that application of estoppel here is appropriate even though the government is a party.

3. Standefer v. United States Is Irrelevant Because It Involved the Distinctly Different Procedures of Criminal Law.

In seeking principles and precedent for its proposition that it should be immune from preclusion, the gov-

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[11]This result cannot be disguised merely by calling *68 Veterans* the decision of an inferior court entitled at most to a persuasive role under the doctrine of *stare decisis*. One can recognize a conflict in the circuits whether it arises from a decision of a Court of Appeals or from a decision of a district court which has become the rule of a circuit through application of collateral estoppel. This is the meaning of the remarks of the court below at 672 F. 2d at 1329 n. 14; Petition of the United States at 17a-18a n. 14.

ernment points to *Standefer v. United States*, 447 U. S. 10 (1980), in which this Court held that, in a criminal case against one charged with aiding and abetting, the government could not be collaterally estopped by the prior acquittal of the principal. The government suggests that *Standefer* authorized its immunity from preclusion in all cases because, in identifying the strong federal interest in the enforcement of the criminal law, this Court referred to *Parklane Hosiery* and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313 (1971) as suits between private litigants involving private rights. 447 U. S. at 24. The government thus implies that *Parklane Hosiery* and *Blonder-Tongue* have been held to be inapplicable to it.

It would be wrong to apply *Standefer* to civil litigation. A simple reading of *Standefer* against its facts shows that the case concerns criminal law only. Further, and more importantly, the essential reason for the inapplicability of collateral estoppel in *Standefer* was that, under the *Parklane Hosiery* test itself, criminal prosecutions do not offer the government "the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." 447 U. S. at 22. In criminal cases, the government does not have the procedural rights and opportunities that are available in civil litigation—for example, discovery and appeal from an adverse judgment.

Thus, even though the Court determined that the Government could not be estopped in a criminal case, it reached its conclusion on the ground that, in a criminal context, the Government could not have the requisite "full and fair opportunity" that triggers estoppel. This rationale does not extend to areas other than criminal

law where the right to appeal and other litigation rights exist and thus render the question of full and fair opportunity pertinent.

4. The Government's Participation in an Unusual Amount of Litigation and the Solicitor General's Method of Deciding Which Cases to Appeal Are Not Relevant Considerations.

That "the government is involved in far more litigation than any other party," Brief of the United States at 27, is an assertion that is irrelevant to the issue now before the Court. Indeed, as noted, the government may be unique in that it participates in an unusual amount of litigation. However, the government is also unique in that it has far more resources for the conduct of its litigation than any state, private person, or corporation that is also compelled to litigate frequently and in a number of jurisdictions. Moreover, the doctrines of preclusion are not rules of housekeeping to be applied or not in order to help the government manage its caseload any more than they would be utilized to aid any other litigant for the same purpose. Last, the government's immunity from preclusion is more likely than not to increase its caseload as litigants, who might have otherwise relied on prior judgments, prosecute their own suits against the government.

The government further claims that it should never be subject to preclusion when issues of public importance are at stake because "through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for determining whether to take an appeal from or seek certiorari review of an ad-

verse decision." Brief for the the United States at 30. Although great respect is due to the Solicitor General, the doctrines of preclusion should not be abrogated simply because of the manner in which the Solicitor General makes decisions under 28 C. F. R. § 0.20. Moreover, the question of the effect of collateral estoppel in this case on the development of the law or on the government's ability to change its mind on legal issues over time, *see* Brief for the United States at 31-32, has already been canvassed above.

The government, however, utilizes the role of the Solicitor General to advance a slight but immaterial variation on the argument that preclusion will freeze development of the law. The government claims that, if it is subject to preclusion, the Solicitor General will have to abandon the practice of selectively pursuing appellate review in order to assure itself that the first adverse decision the government suffers on a question of law will not forever bind it. It argues that such will result either in an increased caseload for the higher courts or the finality of a possibly erroneous rule of law. In this case, however, these considerations are not affected by the role of the Solicitor General for the simple reason that, as discussed in preceding sections of this brief, the considerations are not involved here. No matter how germane they may be to a case like *Stauffer Chemical*, it remains that, as discussed previously, this case can have no such effects.

CONCLUSION

Throughout this brief, the Respondent has emphasized the facts of his case for the obvious reason that the application of collateral estoppel, in the last analysis, depends upon the circumstances of the case. Therefore, whatever merit there may be to the government's argument in another context, those arguments do not establish that estopping the government in the context of this case would be unfair or that some overriding public interest warrants an exception to the preclusion doctrine. The judgment of the United States Court of Appeals for the Ninth Circuit in this case should be affirmed.

Respectfully submitted,

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